88-1564

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

KEVIN P. JUDGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented for Review

Does the Court of Appeals' decision in *United States v. Judge,* #87-1071 (5th Cir. January 23, 1989), that closed containers may be opened during warrantless inventory searches whenever law enforcement officials "could have legitimately had an administrative purpose" in doing so, directly conflict with the decision of the United States Supreme Court in *Colorado v. Bertine,* 479 U.S. 367, 107 S. Ct. 738 (1987), that closed containers may be opened during inventory searches only when police regulations *mandate* such action?

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* The caption of the case in this Court contains the names of all parties. *See* Rule 21.1(b) of the Rules of the Supreme Court of the United States.

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REPORTS OF OPINIONS BELOW.

United States v. Judge, _____ F.2d _____, slip op. No. 87-1071 (5th Cir. January 23, 1989).

See also United States v. Judge, 846 F.2d 274 (5th Cir. 1988) (limited remand).

United States v. Judge, slip op. No. CR 4-86-127-E (N.D. Tex. Nov. 16, 1988) (opinion on remand).

IN THE

Supreme Court of the United States

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No. _____

KEVIN P. JUDGE,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jurisdictional Statement

The date of the judgment sought to be reviewed is January 23, 1989. The date of entry is the same.

Petitioner's suggestion for rehearing *en banc,* treated as a petition for rehearing, was denied on February 21, 1989.

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1254.

Constitutional Provisions and Regulations

This case involves interpretation of the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves certain portions of the Drug Enforcement Administration Agents' Manual, relevant portions of which are included in the Appendix.

Statement of the Case

Kevin P. Judge was convicted of distributing, travelling in interstate commerce to distribute, and conspiring to distribute a controlled substance. Federal jurisdiction was based on 21 U.S.C. §§841 and 846 and 18 U.S.C. §§2 and 1952. He appealed his conviction to the United States Court of Appeals for the Fifth Circuit.

On appeal, the key issue involved the propriety of an inventory search of Mr. Judge's automobile. During the course of that search, a zippered travel bag, found in the locked trunk of the vehicle, was opened by DEA agents. Sixty-five thousand dollars found in the bag was admitted at trial.

The Fifth Circuit panel, citing this Court's decision in *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738 (1987), remanded the case to the District Court for additional findings. *United States v. Judge*, 846 F.2d 274 (5th Cir. 1988). Specifically, the panel held that "[i]f the court below should find that the DEA procedures do not mandate the opening of closed containers to inventory their contents, a new trial must be mandated . . . ." *See id.* at 277.

DEA regulations provide that all closed containers removed from a seized vehicle for safekeeping and return to their owner must be opened. *See* DEA Agents' Manual at 6654.24(D) & 6663.63(C). However, before deciding whether an item should be returned to its owner, and thus—if the item is a closed container—whether it should be opened, *see id.* at 6663.63(C), the agent conducting an inventory must decide whether it has "evidentiary value," *see id.* at 6654.24(D).

Despite the fact that the regulations clearly provide impermissible discretion under *Bertine*, on remand, the District Court found that the search in this case met constitutional muster. After an objection was filed by the defendant, the Fifth Circuit panel held that the District Court's decision was correct and therefore affirmed the defendant's conviction. Mr. Judge now seeks review in this Court by writ of certiorari.

Argument

In *Colorado v. Bertine, supra,* this Court addressed two issues. This Court held that the initial decision to conduct an inventory search of an impounded vehicle may rest upon the discretion of the police officers as long as that discretion is exercised on the basis of something other than the suspicion of evidence of criminal activity. Once that threshold has been crossed, however, and the police have chosen to inventory a vehicle, the Court held that police officers can open closed containers during the inventory only if police procedures *mandate* the opening of such containers in every impounded vehicle.

The Fifth Circuit opinion in this case unfortunately conflates these two points. The court erroneously concludes that the decision whether to open closed containers during an inventory search need not be mandated by police regulations, but may rest upon the discretion of police officers as long as "the DEA agents could have legitimately had an administrative purpose when they opened the bag . . . ." *See United States v. Judge,* slip opinion at 9. In so holding, the court emasculates this Court's requirement in *Bertine* that the opening of closed containers during inventory searches be mandated in order to pass constitutional muster. Consequently, the Fifth Circuit decision directly conflicts with the opinion of this Court in *Colorado v. Bertine* and this case therefore merits review on writ of certiorari.

The precedential danger of the Fifth Circuit decision is illuminated by the facts of this case. As noted above, the DEA regulations at issue do not mandate the opening of all closed containers during inventory searches, but rather provide that after a vehicle is seized, an agent finding a closed container must first decide whether the container has evidentiary value. It is only if the

container has no evidentiary value that it is to be held in safekeeping for the owner, and it is only then that DEA regulations require the opening of that container. In other words, the regulations provide not only the permissible discretion as to whether to conduct an inventory search in the first instance, but they also require the exercise of impermissible discretion as to whether to open a closed container during an inventory. It is respectfully submitted that the Court of Appeals' failure to recognize and address this distinction results in a direct conflict with *Bertine.*

Thus, the DEA agents in this case were not merely vested with discretion as to whether to conduct an inventory search—as would be found constitutional under *Bertine;* rather, the agents were vested with discretion whether to open a closed container once an inventory search is being conducted—which is clearly condemned by *Bertine.* While the Fifth Circuit decision in this case pays lip service to this Court's holding that "police may open closed containers in an inventory search of an automobile only if they are following standard procedures that mandate the opening of such containers in every impounded vehicle", *see United States v. Judge, supra,* slip opinion at 2, by improperly mixing this analysis with this Court's later conclusion that discretion may be exercised in deciding whether to conduct an inventory search, the Fifth Circuit has established a dangerous precedent for future cases. If, as the Fifth Circuit holds, the opening of closed containers during inventory searches is sanctioned whenever agents could legitimately have an administrative purpose, then the requirement of *Bertine* that opening closed containers during inventory searches is permissible only when mandated by police regulations is meaningless. Indeed, it is respectfully submitted that agents could

always have an administrative purpose when opening closed containers, especially when the Fifth Circuit opinion includes looking for "a bomb" or "valuable personal items" as such administrative purposes.

Consequently, the Fifth Circuit decision in this case directly conflicts with decision of this Court in *Bertine.* Review on writ of certiorari by this Court is therefore needed to correct the error committed in the present case and to ensure that *Bertine,* and not the dangerous precedent created by the Fifth Circuit, is followed in evaluating the constitutionality of opening closed containers during inventory searches of automobiles.

Conclusion

In *Colorado v. Bertine*, this Court provided a "bright line" rule in holding that closed containers could be opened during warrantless inventory searches only when mandated by police procedures. While paying lip service to *Bertine*, the Fifth Circuit decision in this case blurs the bright line and effectively emasculates the rule in holding that discretion may be exercised by police officers in deciding whether to open closed containers during warrantless inventory searches as long as the officers "could have legitimately had an administrative purpose". The conflict between these two decisions mandates review on writ of certiorari by this Court.

Moreover, the Fifth Circuit panel's error in the present case caused it to hold that despite the fact that discretion is vested in DEA agents to decide whether to open closed containers during warrantless inventory searches, such discretion did not render the search unconstitutional. It is respectfully submitted that the panel decision is simply incorrect in light of *Bertine*, and the defendant's conviction must therefore be reversed.

Dated: Buffalo, New York
March 20, 1989

Respectfully submitted,

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APPENDIX "A"

Decision of the United States Court of Appeals for the Fifth Circuit #87-1071, entered January 23, 1989

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 87-1071

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN P. JUDGE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(CR-4-86-127)

(January 23, 1989)

Before GARZA, HIGGINBOTHAM and SMITH,
Circuit Judges.

GARZA, *Circuit Judge:*

Kevin P. Judge appealed to this court his conviction for distributing, traveling in interstate commerce to distribute, and conspiring to distribute a controlled substance, and we remanded the case to the District Court to make additional findings. *U.S. v. Judge,* 846 F.2d 274 (5th Cir. 1988). Specifically, we asked the District Court to consider the question of whether Drug

Enforcement Administration ("DEA") agents were acting pursuant to standard procedures when they conducted an inventory search of Judge's automobile and opened a closed backpack inside the automobile containing $65,000. Under the Supreme Court's decision in *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), police may open closed containers in an inventory search of an automobile only if they are following standard procedures that mandate the opening of such containers in every impounded vehicle.

The $65,000 found in the backpack was admitted into evidence in Judge's trial. Judge appeals the admission of the $65,000 as fruits of an allegedly illegal search. We have previously heard argument from both sides in this appeal, and we remanded the case to the District Court for the limited purpose of determining whether the search of Judge's bag was done according to standard procedures as mandated by *Bertine*. The District Court has completed its findings, and we are now in a position to decide the merits of Judges' appeal.

In *Bertine*, the Supreme Court reiterated its position that an inventory search may be reasonable under the Fourth Amendment even though not conducted pursuant to a search warrant. An inventory of an automobile's contents protects the owner's personal property while it is in police custody, and reciprocally protects the police against unfounded claims of lost, stolen, or damaged property. It also can protect the police against dangerous instrumentalities, such as a bomb, in the arrestee's possession. See *Bertine*, 479 U.S. at _____, 93 L.Ed. at 739. *See also South Dakota v. Opperman*, 428 U.S. 364 (1976); *Illinois v. Lafayette*, 462 U.S. 640 (1983).

Before beginning our analysis, it is important that we define the terminology that will be used and more precisely present the factual background. When Judge was arrested, his vehicle was *seized* because DEA agents had probable cause to believe it was used to facilitate the sale of controlled substances. Under the Controlled Substances Act, any conveyance so used is subject to forfeiture to the U. S. Government. 21 U.S.C.A. §881(a)(4) (West's 1981). Thus, Judge's vehicle was seized because it was subject to forfeiture to the United States; however, Judge's bag in the car's trunk was not part of the conveyance. The agents took Judge's bag and other personal belongings in the car for *custodial safekeeping*, even though there was not probable cause to believe they were subject to forfeiture. Only *after* opening the bag and discovering a large sum of money was there probable cause to believe the money was drug proceeds and therefore forfeitable under 21 U.S.C.A. §881(a)(6). We therefore must focus our inquiry on the agents' decision to open the closed bag under the guidelines contained in *Bertine*, which is applicable to inventory searches done for the purpose of custodial safekeeping.[1]

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[1] Defendant argues that DEA regulations, which state that all items *not having evidentiary value* will be returned to their owner (or presumably maintained in custodial safekeeping if the owner is under arrest), vest DEA agents with impermissible discretion under the *Bertine* test since they must decide if an item has evidentiary value. This argument fails because *Bertine* applies to decisions of whether to open containers during an inventory search. When a conveyance is seized as forfeitable, one naturally expects agents to remove from the vehicle all nonforfeitable personal property. While removing that property, it is not an impermissible use of discretion to retain any property (which, by the fact that it is being removed from the vehicle, is in the agents' plain view) that may have evidentiary value. It is impermissible, however, to decide to open a container while removing personal property from the vehicle for the sole reason of looking for evidence.

In this case, the District Court found that once a container is taken into custody, standard DEA procedures mandate that the container be opened and its contents inventoried. However, there are still two discretionary decisions inherent in the above determination. First, an agent must decide whether an object constitutes a "container." Second, an agent must decide whether or not to take the container into custody. Both these areas of discretion will not be analyzed in light of *Bertine*.

The determination of what constitutes a container is inherently discretionary. Suppose, for instance, that an agent finds a shaving kit inside a car. If the agent concludes that the shaving kit is a container, he is bound to open it and inventory its contents. However, if the agent determines for some reason that the kit is not a container, he may not open it, and must list it on the inventory sheet as merely a "shaving kit." Suppose, though, that our hypothetical DEA agent decided that the kit was a container and proceeded to open it, discovering inside among other articles a can of shaving cream and a tube of toothpaste. Is the can of shaving cream a container subject to being opened for an inventory? What about the tube of toothpaste? It all depends on the meaning the DEA agent accords to the word "container," which involves an exercise of discretion. Therefore, as a practical matter, the exercise of some discretion by agents, even if only interpretive, is inevitable since no manual can reasonably be expected to spell out in detail the correct action in light of the almost infinite array of objects an agent may encounter.

Here we should note that *Bertine* does not condemn all forms of police discretion, but only "evidentiary" discretion which is exercised on the basis of suspicion of

criminal activity.[2] This concern, when coupled with the recognized state "administrative" interest in preserving the impounded property and protecting the personal safety of police, provides us with a benchmark from which to determine when the exercise of police discretion exceeds constitutional bounds, even though that discretion may be conferred by standard procedures. Therefore, while it is true that the DEA manual's use of the word "container" vests agents with some discretion in determining whether an object is or is not a container, this is not necessarily a fatal flaw. Rather, we must next review the way in which the agents exercised that discretion. In this task, we are guided by the policy concerns enunciated in *Bertine*. Specifically, we must ask whether the agents' actions, when viewed from an objective standpoint, can reasonably be said to have an administrative or safety motivation, as opposed to an evidentiary one.[3] Thus, an agent may decide to classify

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[2] The *Bertine* court noted that:

> [n]othing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.

Bertine, 479 U.S. at _____, 93 L.Ed. at 748.

[3] The objective standard of review which we apply here to the agents' exercise of discretion is not without precedent in similar areas of the law. As the Supreme Court noted in *Delaware v. Prouse*, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against *'an objective standard'*...." 440 U.S. 648, 654 (1979) (emphasis added). *See also Terry v. Ohio*, 392 U.S. 1, 16 (1968).

(Footnote continued on following page.)

an object as a container and proceed to inventory its contents. If that object is customarily used by most people to carry valuable items, or might reasonably contain a dangerous device which threatens the personal safety of the officer, then it is more probable that officer has stayed within the bounds of constitutional discretion. However, if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence, the opening of the container was an illegal search. In the case at hand, we hold that the agents' decision that the bag was a container was within the bounds of administrative discretion, and was therefore permissible.

In addition to the above interpretive discretion regarding whether an object is a container, the DEA manual also confers discretion upon its agents regarding whether or not to impound an object. While it is true that once an agent takes a container into custody he must open it to inventory its contents, it is up to an agents' "prudent judgment" whether or not to take the container into custody for safekeeping in the first place. The agent has three options when confronted with personal property on an arrestee's person: 1) leave the

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(Footnote continued from preceding page.)

In this Circuit, among others, it is well established that determining whether an arrest is merely a pretext to search turns on an objective determination of the actions of the arresting officers, rather than a subjective determination of intent. *U.S. v. Causey*, 834 F.2d 1179, 1182 (5th Cir. 1987) (*en banc*); *see also U.S. v. Miller*, 821 F.2d 546, 549 (11th Cir. 1987); *U.S. v. Hawkins*, 811 F.2d 210, 213 (3d Cir. 1987), *cert. denied* 108 S.Ct. 110; *Lessman v. McCormick*, 591 F.2d 605, 610 (10th Cir. 1979). Clearly, the arrest in this case was not pretextual. Our discussion of pretextual arrest jurisprudence is intended to provide support by analogy for an objective standard of implementation of the *Bertine* criteria.

property unattended and risk a claim against the government if it is stolen; 2) take the property into custody, or 3) allow the arrested person to designate someone to take possession of the property.[4]

Thus, we are again faced with the same issue that we dealt with above, namely, whether the discretion which arises under DEA standard procedures was used in this case in an evidentiary, as opposed to administrative fashion. Specifically, did the agents' decision to take the contents of the car into custodial safekeeping constitute an impermissible use of discretion? We hold that it did not. Judge was alone when arrested, and there was no showing that it would have been possible to turn the property over to another.

Looking at the facts of this case from an objective standpoint, we are convinced that the DEA agents could have legitimately had an administrative purpose when they opened the bag in Judge's car. Clearly, bags of that sort are often used to carry valuable personal items or,

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[4] The DEA manual sets out the above options as follows:

> *6663.63 Articles Taken Into Custody for Safekeeping . . .*
>
> A. In enforcement situations, property may be encountered on an arrestee or in a search location which is not subject to seizure, but which prudent judgment dictates should not be left unattended. Property left on the person or on the premises unattended and subsequently lost could conceivably result in claims against the government. Within the following guidelines, such property should be taken into custody for safekeeping.
>
> B. To avoid excessive processing, alternative means of securing the property should be explored, *i.e.*, small amounts of currency and personal jewelry on a detainee could be secured and receipted for by detention center officials. Where the property belongs to a person who has been placed under arrest, request that he designate someone to take possession. Do not release any property in this manner without the written consent of the subject.

DEA manual, §6663.63 (A) & (B).

as was the case here, sums of money. It was also large enough to contain a bomb or gun. Therefore, although the DEA manual confers a certain amount of discretion upon the agents, we are convinced that they exercised that discretion within constitutional bounds.[5]

Judge also argues on appeal that he was given insufficient access to the DEA manual for purposes of presenting his case on remand to the District Court. Specifically, he argues that since he was given photocopied portions of the manual two hours before the hearing on remand, he had insufficient opportunity to prepare adequately. We have viewed *in camera* the entire DEA manual, which is not subject to public disclosure, and upon comparing it with the photocopied portions provided to Judge we find that he had access to all the provisions relevant to his case. Moreover, the District Court found, and we agree, that two hours was sufficient time for Judge's counsel to read the portions of the manual with which he was provided and to formulate a strategy for representation and cross-examination.

Accordingly, the findings of the District Court on remand that the DEA inventory search of Judge's car was conducted in accordance with standard procedures, and the District Court's decision at trial to admit the $65,000 discovered during the inventory search as evidence were correct and his conviction is AFFIRMED.

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[5] It would be disingenuous of us to pretend that when the agents opened Judge's bag, they weren't hoping to find some more evidence to use against him. But, they could have also reasonably had an administrative motive, which is all that is required under *Bertine*. While there are undoubtedly mixed motives in the vast majority of inventory searches, the constitution does not require and our human limitations do not allow us to peer into a police officer's "heart of hearts."

APPENDIX "B"

Decision of the United States District Court for the Northern District of Texas, Criminal Docket #4-86-127-E, entered November 16, 1988

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Texas
Fort Worth Division

Criminal No. CR 4-86-127-E

UNITED STATES OF AMERICA,

vs.

KEVIN P. JUDGE.

ORDER

This criminal action was remanded to this Court by the Fifth Circuit Court of Appeals for the "limited purpose of allowing the government the opportunity to present to the court any procedures that the Drug Enforcement Administration has in inventorying the contents of a seized automobile and whether or not such procedures allow the agents to open such containers and so forth."[1] After Judge's criminal trial and during the pendency of his appeal, the United States Supreme Court's decided *Colorado v. Bertine,* 479 U.S. 367 (1987). It is under the inventory search standards established in *Bertine* that the Court of Appeals asks this Court to determine the validity of the search of Judge's automobile.

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[1] *United States v. Judge,* 846 F.2d 274, 277 (5th Cir. 1988).

The DEA Agents Manual was submitted to this Court for in camera inspection. The Court has reviewed the Manual and has determined that counsel for Defendant Judge was provided with copies of all the relevant Manual provisions necessary for consideration of the issue to be determined on remand. The pertinent Manual provisions were introduced into evidence at the hearing held on this matter and were identified as Government Exhibits A, B, and C. The entire Manual, Government Exhibit D, was also introduced into evidence and made a part of the record on remand.

To safeguard the investigative and deliberative process procedures of the DEA, counsel for Defendant Judge was not permitted to review the entire Manual. He was, however, allowed to view those selected portions of the Manual which the Court determined to be relevant to the remand issue and introduced into evidence. Counsel for the Defendant was allowed approximately two hours prior to the hearing to review this material. The Court was convinced that the time allotted was more than adequate, as the Government had attached the same material to its brief months before in the Fifth Circuit Court of Appeals. The manual provisions selected and introduced certainly came as no surprise. Counsel for the Defendant appeared entirely familiar with them; his cross-examination of the Government's witness concerning the selected manual provisions was extremely competent and exhaustively thorough. The Court finds that neither counsel nor his client, Judge, was in any way prejudiced by the allowance of a two-hour time period in which to review the selected materials prior to the hearing on the remand issue (Government Exhibits A, B, and C).

Section 6663.63(C) of the DEA Agents Manual (Government's Exhibit B) concerning "Articles Taken Into Custody for Safekeeping" provides in pertinent part that: "To protect DEA against any subsequent claims regarding lost or missing property, all property taken into custody for safekeeping will be thoroughly inventoried, including opening locked containers to inventory their contents." Section 6654.24(D), which deals with the seizure of conveyances used in connection with the sale of a controlled substance, further provides that: "Upon seizing the conveyance, it must be thoroughly searched to inventory its' contents. This search need not be contemporaneous with an arrest, and no search warrant is needed." These provisions clearly "mandate the opening of closed containers to inventory their contents."[1]

Counsel for Defendant Judge, in his post-hearing motion, argues that Agent Lunt's admission at the remand hearing that DEA agents exercised their discretion whether to inventory the contents of *all* containers seized, or decided, alternatively, to simply list a container as an item seized on their inventory listing, somehow distinguishes the inventory search provisions quoted above from those upheld in *Bertine*. Agent Lunt admitted that if, during the course of inventorying items seized, an agent discovered a shaving kit, he was vested with the discretion to inventory its contents, that is, the agent could simply list the item as a "shaving kit" or itemize its contents separately, such as "razor blade," "shaving brush," "shaving creme," and "bag."

The Court fails to see how this distinction renders the DEA agents' inventory search of Judge's automobile invalid under *Bertine*. In this case, Judge's automobile was seized and inventoried in the parking lot of the

[1] *Judge*, 846 F.2d at 277.

restaurant where he was arrested. Judge's automobile was used in connection with the sale of 3 kilograms of cocaine for which he was convicted. Pursuant to sections 6663.63 and 6654.24, the agents seized the automobile and inventoried the contents of a sealed bag which contained $65,000.00 in cash. As the above quoted Manual provisions demonstrate, the agents performed the inventory search according to a "standard criteria."[3] There is not a single inference in the record thus developed before the Court that these agents in any way acted in bad faith. The fact that agents could have decided to list each dollar separately, or a total cash amount of $65,000.00, does not make it otherwise.

Once the agents are mandated according to a standardized criteria to inventory the contents of containers lawfully seized, it makes no difference that they are vested with some *administrative* discretion in the manner the inventory search is to be performed. As long as the inventory search is conducted according to standardized procedures and not "to investigate suspected criminal activity,"[4] the *Bertine* criteria is met.

Moreover, in this case, there is absolutely no evidence which suggests that the agents exercised any administrative discretion when performing the inventory search of Judge's automobile. It has never been suggested that the agents selectively inventoried the contents of Judge's automobile. If anything, Judge could only complain of the agents' thoroughness and their discovery of the $65,000.00. But this complaint does not invalidate the agents' inventory search under *Bertine*. The fact that, perhaps, in some other hypothetical search, the agents could make the administrative, not

[3] *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

[4] *Id.* at 376.

evidentiary, decision to list a container as a single item or list its contents separately has no bearing here, where the agents strictly complied with the Manual's requirement that contents of all items seized "be thoroughly searched to inventory its contents."[5]

For the foregoing reasons, the Court FINDS that the standard procedures followed by DEA agents in making inventories is within the requirements of *Bertine.* The evidence adduced at the hearing and referred to in this Order to support the Court's finding must be TRANSMITTED to the United States Court of Appeals for the Fifth Circuit according to the instructions contained in the court's opinion issued in this cause on May 20, 1988 (No. 87-1071).

It is so Ordered.

Signed this 16th day of November, 1988.

ELDON B. MAHON
Eldon B. Mahon
United States District Judge

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[5] DEA Agents Manual §6654.24(D).

APPENDIX "C"

Decision of the United States Court of Appeals for the Fifth Circuit, Docket # 87-1071, entered May 20, 1988

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 87-1071

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN P. JUDGE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(May 20, 1988)

Before GARZA, HIGGINBOTHAM and SMITH,
Circuit Judges.

GARZA, *Circuit Judge:*

Kevin P. Judge appeals from his conviction for distributing, traveling in interstate commerce to distribute, and conspiring to distribute a controlled

substance. Finding that the Government failed to introduce evidence that the arresting officers followed standardized police procedures in conducting an inventory search of the appellant's automobile, we remand this case to the district court.

I.

The charges brought against the appellant derive from two cocaine transactions. The first transaction began with a series of telephone calls between agents of the Drug Enforcement Administration (DEA) and Joe Frazer. Frazer arranged to travel to Fort Worth, Texas from New York to sell a sample of cocaine to one of the undercover agents. On June 16, 1986, Frazer delivered one ounce of pure cocaine to the agent. During the transaction Frazer made reference to the appellant as his "boss" in New York. The jury acquitted the appellant of the two charges relating to this transaction.

Sometime later, the same undercover agents negotiated with Frazer and the appellant about purchasing a larger quantity of cocaine. One of the agents spoke directly to the appellant in New York on two occasions. On June 23, the appellant met two of the agents in a restaurant in the Fort Worth area. The agents showed the appellant a roll of money which was represented as being $144,000. This sum was to be traded for the appellant's three kilograms of cocaine. The appellant contacted Frazer in New York, and subsequently told the agents that Frazer would drive the cocaine down to Texas from New York the following day. It was agreed at this meeting that Frazer would deliver the cocaine to one of the agents and that the appellant would be nearby to collect the money from the other agent.

On June 25, the same two agents met the appellant at the same restaurant. DEA agents observed the appellant drive to the restaurant and park his rented Lincoln Continental in the parking lot. The appellant made arrangements for one of the agents to meet Frazer at a local shopping mart to receive the cocaine while the other agent and the appellant remained at the restaurant.

When word was received that Frazer had been arrested with three kilograms of high grade cocaine, several agents then approached and arrested the appellant in the restaurant. While the appellant was handcuffed, one of the agents searched his clothing and removed his car keys from his hip pocket. Cash in the amount of $5,200 was found in the appellant's wallet.

The appellant's automobile was seized and inventoried in the restaurant's parking lot. The agents neither received consent nor obtained a search warrant for the seizure and inventory. Upon opening the trunk, the agents found a sealed bag which they opened. Among other things, the agents discovered $65,000 in currency in the bag.

After his indictment the appellant moved to suppress the $65,000. The district court denied the motion after hearing argument on the validity of the inventory. At trial, the money was admitted into evidence over objection that its seizure was violative of the appellant's fourth amendment protections.

Judge was convicted by a jury on three of five counts relating to the conspiracy, travel in interstate commerce, and distribution of cocaine in connection with the second transaction. The district court sentenced him to concurrent terms of twenty, twenty, and five years in prison, and fined him $10,000.

II.

We are asked to consider whether the appellant's fourth amendment rights were compromised during the inventory search based on the Supreme Court's decision in *Colorado v. Bertine*, _____ U.S. _____, 107 S.Ct. 738 (1987). The Government maintains that the search and seizure of the appellant's automobile constituted an inventory search, and that searches of closed containers in locked trunks of seized automobiles are permissible. However, the Government presented no evidence that such procedures were required by DEA regulations or that the decision to search a sealed bag in a locked trunk was not discretionary on the part of the agents conducting the search.

In *Bertine*, the Court set the parameters in which inventory searches of automobiles are justified under the Constitution. The inventory of a closed backpack which disclosed controlled substances, drug paraphernalia, and cash was held to be permissible in that case because the seized van was inventoried in accordance with local police procedures. Those procedures required a detailed inspection and inventory of all impounded vehicles. *Id.* at _____, 107 S.Ct. at 740. The *Bertine* Court emphasized that the trial court found that there were applicable police procedures which mandated the opening of closed containers in automobiles subject to inventory. *Id.* at _____ n.6, 107 S.Ct. at 742 n.6. The inventory search was held to be reasonable because it was conducted according to standardized criteria. It is clear, however, that an inventory search is unreasonable if it is conducted "in bad faith or for the sole purpose of investigation." *Id.* at _____, 107 S.Ct. at 742. While the Court's majority opinion stressed that specific police procedures must be followed during an inventory search, the three justice concurrence also recognized:

> [I]t is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle. As the Court emphasizes, the trial court in this case found that the police department's standard procedures did mandate the opening of closed containers and the listing of their contents.

Id. at _____, 107 S.Ct. at 744 (Blackmun, J., concurring).

The appellant claims that because the district court did not have evidence before it showing that DEA regulations mandated the opening of his bag from a locked trunk, admission of the $65,000 was improper under the analysis in *Bertine*. The only testimony before the district court was that the standard procedure is to inventory seized vehicles either at the scene or at the Government's parking garage. At oral argument before this panel the Government's attorney conceded that he failed during the trial to present testimony that the agents relied upon standardized criteria mandating that closed containers be opened during an inventory search.

Because of the Government's failure to produce this evidence, we cannot tell whether the requirements of *Bertine* were followed to see whether the $65,000 should have been admitted into evidence. Police officers may open closed containers found within locked trunks while conducting routine inventory searches of impounded vehicles. However, such inventories must be conducted pursuant to standardized police caretaking procedures. *See United States v. Young*, 825 F.2d 60, 61 (5th Cir. 1987); *United States v. Johnson*, 815 F.2d 309, 314 n.6 (5th Cir. 1987).

The Government has asked us to take judicial notice of certain regulations in the DEA's manual. We decline to take notice of the material appended to the Government's brief for two reasons. First, it is not part of the record which was sent up to us by the lower court. Second, according to Rule 201 of the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201. Arguably, application of the appended provisions to the facts presented here is subject to reasonable dispute. The Government, moreover, selectively reprinted portions of the manual. Thus, we are unaware of other provisions which may have a bearing on the facts presented here. Additionally, the selective reprinting does not give the appellant an adequate opportunity to challenge the applicability and administration of the provisions.

III.

The appellant presents several other challenges on appeal. These challenges run the gamut from ineffective assistance of counsel, to excessive sentence, to claimed evidentiary errors. We find no merit in any of these other claims. The appellant also complains that the district court erred in admitting into evidence the $5,200 which was found in his wallet. We find no error.

IV.

Because it was not established that *Bertine* was followed in this case, we REMAND this case to the district court for the limited purpose of allowing the

government the opportunity to present to the court any procedures that the Drug Enforcement Administration has in inventorying the contents of a seized automobile and whether or not such procedures allow the agents to open such containers and so forth. If the court below should find that the DEA procedures do not mandate the opening of closed containers to inventory their contents, a new trial must be mandated and the $65,000 should be suppressed. If the court below finds that the standard procedures followed by DEA agents in making inventories is within the requirements of *Bertine* he should make such finding and evidence from which such finding was made must be sent to this court for use to determine its validity with the defendant having an opportunity within ten days of objecting to such finding. If we should find that the lower court was correct and that *Bertine* was complied with, we will affirm the conviction.

REMANDED

APPENDIX "D"

Order of the United States Court of Appeals for the Fifth Circuit, Docket #87-1071, entered February 21, 1989

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 87-1071

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KEVIN JUDGE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 01-23-89, 5 Cir., 198__, _____ F.2d _____)

(February 21, 1989)

Before: GARZA, HIGGINBOTHAM and SMITH,
Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PATRICK S. HIGGINBOTHAM
United States Circuit Judge

APPENDIX "E"

Selected Portions of the Drug Enforcement Administration Agents' Manual

6654.24 Conveyances. (See Section 0324 of the Administrative Manual.)

A. 21 USC 881(a)(4) provides that any conveyance (aircraft, vehicle, vessel, etc.) is subject to forfeiture if it is used, or intended to be used, to transport or facilitate the transportation, sale, receipt, possession, or concealment of controlled drugs, raw materials, or equipment in violation of the CSA. It excludes from this innocent common carriers and stolen vehicles.

The law thus provides DEA with latitude to seize conveyances under a broad range of circumstances. It is DEA policy that, in any circumstance where probable cause exists to believe that a conveyance was used or intended to be used in a manner meeting the criteria of 21 USC 881(a)(4), the conveyance will be seized.

B. Exceptions to the policy of routine seizure are as follows:

1. Where the value of the currency or other asset is less than $1,000.

2. Where the value of conveyances other than aircraft or vessels is less than $2,500.00.

3. Where the value of aircraft and vessels is less than $5,000.00.

4. Where the value of real property is less than $10,000.00.

NOTE: If special circumstances exist which justify the seizure of property valued as less than the stated amounts, the SAC may authorize such seizure. The special circumstances should be explained on the DEA Form 453.

5. Where the conveyance is inoperable to the point that it reasonably could not be used again in a drug violation.

6. Where the conveyance is in a repair shop and the cost of the repairs is substantial versus the value of the conveyance.

Note: Where this is not the case, attempt to have the repair shop release the conveyance and file a petition to recover the charges. If this is not possible, pay the repair bill and charge the payment as cost of seizure.

7. Where, in the period between the time the conveyance was used in a violation and the time it may be seized, possession has transferred to an innocent party. Examples:

a. If a lienor has repossessed the conveyance for reasons other than that he knows the conveyance is subject to forfeiture (if there is indication that this was the reason for repossession, then the conveyance will be seized).

b. If the conveyance was rented at the time of the violation, but is returned to the rental company prior to seizure.

c. If, prior to seizure, the conveyance is sold to an innocent purchaser (if there is indication that this sale was initiated to defeat the seizure, then the seizure should be made).

8. Where only trace amounts of drugs are involved. A trace is defined as less than a dosage unit of a controlled drug (or less than one-half gram of marijuana).

9. Where the conveyance was stolen and was in this status during the violation.

10. Where the conveyance is a common carrier, unless the person in charge or owner had knowledge of its intended use in violating the law.

11. Adopted seizures (where the conveyance is seized as a result of an investigation in which DEA agents did not participate), unless a substantial amount of drug is involved. In the case of an aircraft, consult with Headquarters (OS), prior to adopting any seizure.

C. Where a special circumstance exists in which an exception to A or B above is felt warranted (either not to seize a conveyance that otherwise should be, or the converse), then Headquarters (CC) should be consulted by telephone.

D. Upon seizing the conveyance, it must be thoroughly searched to inventory its' contents. This search need not be contemporaneous with an arrest, and no search warrant is needed. All articles not part of the conveyance and not having evidentiary value, or not subject to separate forfeiture action, will be removed and returned to the owner without delay (see 6663.63). Accessories, jacks, and standard maintenance tools are considered part of the conveyance. Installed radios, tape players, etc., are also part of the conveyance. Tapes found in a tape player are part of the conveyance, but loose tapes are not.

E. In seizing an aircraft, do not attempt to inventory or move it without the assistance of a qualified pilot. Contact Headquarters (OS) by telephone to initiate assistance of this nature.

F. Within 5 calendar days of the seizure, prepare a DEA Form 453. Preparation instructions are provided on the reverse of the form. Probable cause must be provided on DEA Form 453. Submit the original to the computer

terminal operator for input into the computerized asset program. Affix DEA Form 453, Copy No. 3, inside the windshield of the conveyance or in some other prominent place on the property seized.

G. *Quick Release Policy.* Since DEA will not respond to inquiries from lenders regarding criminal records of potential customers, it is DEA policy that, upon satisfactory showing, conveyances will be released to innocent registered owners or lienors prior to initiating forfeiture proceedings. Quick releasing a conveyance is merely an expeditious means of resolving seizures which, if pursued through forfeiture proceedings, would ultimately result in DEA granting relief through the petition process. Conveyances for quick-release must be returned within 48 hours of seizure.

Note: Once seizure is referred to the U.S. Attorney, it cannot be processed under this quick-release policy unless the matter is referred back to DEA. Referrals back to DEA will be coordinated by the Chief Counsel, Asset Forfeiture Unit (CC/AFU).

1. Upon receipt of the DEA Form 453, the Group Supervisor will determine if quick-release of the conveyance is warranted.

The following questions bearing on the innocence of the registered owner are pertinent to this determination:

a. Did the registered owner have knowledge of the violation?

b. Does the registered owner have a prior record or reputation as a drug violator?

c. Was a straw purchase involved?

d. Was the conveyance registered to the parent for insurance purposes because the violator was under age?

e. Did the violator have principle use and control over the conveyance?

f. Do other conditions exist that justify the initiation of formal forfeiture proceedings?

2. If the answers to the foregoing questions are determined to be *No*, the conveyance should be returned to the registered owner provided the owner completes a Vehicle Indemnity Agreement (DEA Form 292). The details concerning the seizure and return of the property should be reported on DEA Form 453.

Prior to releasing a conveyance to a registered owner, determine whether a lien exists on it. If so, indicate the name and address of the lienor on the DEA Form 453.

3. If the answer to any question in 1 above is YES, *and no lien exists*, proceed with appropriate forfeiture procedures.

4. If the answer to any question in 1 above is YES, *and a lien exists*, conduct a full lien inquiry to determine the extent of the lienholder's equity.

a. If the difference between the lien and appraised value is *more* than $2,500 ($5,000 for vessels and aircraft), proceed with the appropriate forfeiture proceedings.

b. If the difference between the lien and appraised value is *less* than $2,500 ($5,000 for vessels and aircraft), the vehicle should be released to the lienholder, provided the following conditions are met:

(1) He had no prior knowledge of the violation.

(2) He provides satisfactory proof of interest (sales contract, installment note, certificate of title).

(3) He executes a DEA Form 292.

(4) He agrees to pay all costs of seizure.

Note: Any decision by the SAC that may result in placing a conveyance into official use, or DEA incurring an expense to pay off a lien, must be coordinated with the Chief Counsel, Asset Forfeiture Unit.

5. Any conveyance that is valued less than $2,500 ($5,000 for vessels and aircraft) will not be processed for forfeiture. All such conveyances will be returned to their owners or their appointed representatives within 48 hours of seizure. All owners must pay any costs incident to the seizure. Seized conveyances that cannot be returned should be processed for abandonment.

6. Where a conveyance is quick-released, prepare the DEA Form 453 as above. In Block No. 43, Facts to Establish Probable Cause, a complete justification for releasing the conveyance, as well as details of the return, will be provided. The details must also include the date the DEA Form 292 was executed and the parties involved. The executed DEA Form 292 will be filed in the local field office files.

H. Once it is determined that a conveyance will undergo forfeiture proceedings, it must be stored in a reasonably secure storage facility (commercial, USMS, or GSA); see 6654.22H. Prepare vehicles for long-term storage to include at least the following:

1. Remove the exterior accessories such as hub caps and lock them in the trunk.

2. Inflate tires to correct pressure.

3. Make sure battery is properly filled.

4. When climate dictates, add sufficient anti-freeze to radiator.

5. Affix a DEA Form 453, Copy No. 3, to the inside of the windshield (if not done previously).

6. Lock all doors, shut all windows.

Where the conveyance is an aircraft or vessel, consult with Headquarters OS regarding storage arrangements, as well as movement of the aircraft/vessel to the storage site.

* * *

6663.63 Articles Taken Into Custody for Safekeeping. (See 6663.67 for special procedures relating to money.)

A. In enforcement situations, property may be encountered on an arrestee or in a search location which is not subject to seizure, but which prudent judgment dictates should not be left unattended. Property left on the person or on the premises unattended and subsequently lost could conceivably result in claims against the government. Within the following guidelines, such property should be taken into custody for safekeeping.

B. To avoid excessive processing, alternative means of securing the property should be explored, i.e., small amounts of currency and personal jewelry on a detainee could be secured and receipted for by detention center officials. Where the property belongs to a person who has been placed under arrest, request that he designate someone to take possession. Do not release any property in this manner without the written consent of the subject.

C. To protect DEA against any subsequent claims regarding lost or missing property, all property taken into custody for safekeeping will be thoroughly inventoried, including opening locked containers to

inventory their contents. All property will be itemized and receipted on a DEA Form 12 (or as a separate category on the search warrant inventory) with the notation "taken for safekeeping subject to return to the lawful owner." If the lawful owner is not present, a copy of DEA Form 12 (or the search warrant) will be left on the premises.

D. All such property will be reported on the DEA Form 6 reporting the activity in which the property was acquired. If the period of DEA custody will exceed 2 working days, it will also be reported on DEA Form 7a, identified, sealed, and transferred to the Evidence Custodian.

E. The case agent will take appropriate measures to return the property to the lawful owner (or his designee) as soon as possible. The return will be receipted on DEA Form 12; or, if a DEA Form 7a was prepared, on DEA Form 48a. The return procedures set forth in 6663.54 shall be followed.

* * *